Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	
Declaratory Ruling and Preemption	)	WC Docket No. 04-245
of State Action	)	
	)	

OPPOSITION OF COVAD COMMUNICATIONS TO BELLSOUTH'S EMERGENCY PETITION FOR DECLARATORY RULING AND PREEMPTION OF STATE ACTION

Charles E. Watkins
Senior Counsel
Covad Communications
1230 Peachtree Street, N.E.
19th Floor
Atlanta, Georgia 30309

Praveen Goyal
Senior Counsel for Government and
Regulatory Affairs
Covad Communications
600 14th St., NW Suite 750
Washington, DC 20005

July 30, 2004

SUMMARY

Covad Communications, by its attorneys, herewith respectfully submits its opposition to the emergency petition for declaratory ruling and preemption of state action of BellSouth Corporation ("BellSouth").[1] BellSouth's petition is a blatant attempt to upset the long-understood statutory relationship between the federal and state jurisdictions to implement and enforce the provisions of Section 271 of the Act.[2] Far from presenting the mere narrow question of whether a particular state action conflicts with federal law under long-understood principles of conflict preemption, BellSouth's petition attempts to read the plain role of state commissions in implementing and enforcing Bell company compliance with the terms of section 271 entirely out of the Act.

The Commission should deny BellSouth's emergency petition for a number of reasons. As an initial matter, BellSouth's petition is clearly not yet ripe – the Tennessee Regulatory Authority (TRA) has not yet even issued the decision of which BellSouth complains. In the absence of a decision by the TRA, there is simply no basis for this Commission to even determine whether or not the TRA's order conflicts with federal law. Furthermore, the Act is clear that Congress has expressly conferred jurisdiction over interconnection agreements implementing competitor access to network elements listed in 271(c)(2)(B)(i)-(xiv) ("the competitive checklist") – including network elements which are independent of section 251 unbundling requirements – in the state commissions. Thus, notwithstanding BellSouth's protestations to the contrary, the state commissions clearly enjoy subject matter jurisdiction over the terms of access to section 271 checklist

[1] *See* BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245, filed Jul. 1, 2004.

[2] *See* 47 U.S.C. § 271.

items. Additionally, in the specific circumstances of the Covad 271 arbitrations of which BellSouth complains, the parties have voluntarily negotiated access to line sharing in the context of a 252 interconnection agreement amendment. Thus, state commissions have jurisdiction to address the issue of access to line sharing as an "open issue" pursuant to section 252, as recognized by the 5th Circuit U.S. Court of Appeals.[3] Finally, the Commission should reject BellSouth's view of the lack of state commission jurisdiction over the terms of access under Section 271, because it will bury the Commission in the work of interconnection agreement arbitration ordinarily performed by the state commissions.

I. The Act Clearly Confers Exclusive Jurisdiction to State Commissions over the Terms of Access to Checklist Items under Section 271.

BellSouth brazenly – and quite clearly, mistakenly – contends that "state commissions have no jurisdiction over the rates, terms and conditions of elements provided by RBOCs to CLECs pursuant to section 271."[4] In fact, the plain language of the Act is quite clear that state commissions exclusively enjoy jurisdiction in the first instance over establishing the rates, terms and conditions of access to elements provided by RBOCs to CLECs pursuant to section 271. Specifically, section 271(c)(2)(A) makes clear that state commissions enjoy such exclusive jurisdiction by virtue of their authority to regulate the terms of interconnection agreements and Statements of Generally Available Terms (SGATs).[5] As the terms of the statute make clear, a Bell company can meet the requirements of section 271 only if it offers "interconnection and access"[6] set

[3] *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003).

[4] *See* BellSouth Petition at 5.

[5] *See* 47 U.S.C. §271(c)(2)(A).

[6] 47 U.S.C. §271(c)(2)(A)(i).

forth in interconnection agreements or an SGAT approved by the relevant state commission under section 252,[7] and "*such* interconnection and access"[8] meets the requirements of the competitive checklist. Furthermore, as section 252 makes clear, state commissions enjoy exclusive jurisdiction in the first instance to arbitrate or approve the terms of interconnection agreements or SGATs,[9] authority which devolves to the federal Commission only where a state commission refuses to act.[10]

The Commission's own interpretation of the interplay of sections 251 and 271 makes it clear that state commission have jurisdiction to resolve interconnection agreement disputes over 271 checklist items pursuant to 252.[11] As the Commission recognized in the TRO, the only sensible reading of the section 271 checklist is that it creates obligations to unbundle network elements separate and apart from the unbundling obligations in section 251(c)(3).[13] Yet, for either set of unbundling obligations (whether under section 271 or 251), the Act requires equally that they all be offered pursuant "binding agreements that have been approved under section 252"[14] or SGATs "approved or permitted to take effect by a State commission under section 252(f)."[15] Manifestly then, Congress conferred exclusive jurisdiction upon state commissions in the first

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[7] *See* 47 U.S.C. §271(c)(1)(A) and (B).

[8] 47 U.S.C. §271(c)(2)(A)(ii).

[9] *See* 47 U.S.C. §252(e) and (f).

[10] *See* 47 U.S.C. §252(e)(5).

[11] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC-03-36). In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket No. 01-338, *et al.,* Federal Communications Commission ("FCC") 03-36 (rel. Aug. 21, 2003), ¶¶ 653-667 ("*Triennial Review Order*" or "*TRO*").

[13] TRO ¶ 654.

[14] 47 U.S.C. § 271(c)(1)(A).

[15] 47 U.S.C. § 271(c)(1)(B).

instance to resolve the terms of access to competitive checklist items under section 271. The declaration which BellSouth now seeks, "that state commissions have no jurisdiction over elements provided pursuant to section 271 for which there is no commission impairment finding under section 251", directly conflicts with this Congressional grant of exclusive jurisdiction. Given that, as the Commission has already recognized, sections 271 and 251 create unbundling obligations independent of each other, this Commission's determinations regarding the list of network elements to be unbundled under section 251 do not change the subject matter jurisdiction conferred by Congress to state commissions over the terms of access to items set out in the section 271 checklist.

BellSouth avoids this inconveniently plain statutory language by conflating the federal Commission's authority to approve a Bell company's application for interLATA authority and enforce the terms of such approval, with the state commission's underlying jurisdiction over implementing the terms of competitor access to Bell company facilities. As explained above, however, rather than conferring authority for both of these functions on this Commission, the Act very clearly divides these roles between this Commission and the state commissions. BellSouth's effort to convert the Commission's enforcement jurisdiction under 271(d)(6) into jurisdiction over the arbitration of interconnection agreements is unsupportable.

On the contrary, the plain language of the Act makes clear that Bell company compliance with section 271 depends upon continuing 252 jurisdiction by state commissions over the terms of access to network elements set forth in the 271 checklist. Section 271(d)(6) makes clear that a Bell operating company has the obligation to continue to meet the conditions required for approval – which include providing

interconnection to 271-specific competitive checklist items via "binding agreements that have been approved under section 252".[16] Although 271(d)(6) confers federal jurisdiction to address a Bell operating company's failure to allow such interconnection by revoking interLATA approval, that jurisdiction is limited to addressing the non-compliance by enforcement action, not the implementation of the terms of such access and interconnection in the first place.[17] Jurisdiction over the creation of the 252 agreements – including "terms and conditions" – is expressly placed in state commissions.[18]

Moreover, the notion that the approval of a section 271 application in a particular state somehow erases such statutorily conferred authority post-approval is absurd. The mere fact that a section 271 application has been granted for a particular state no more eliminates continuing state commission jurisdiction to regulate the terms of access to 271 checklist items through the section 252 approval process than it eliminates that same jurisdiction over the terms of access to UNEs under section 251. Rather, continuing compliance with the requirements of either section 271 or section 251 requires the continuing availability of access and interconnection pursuant to agreements approved by state commissions under section 252. All that changes upon the grant of a section 271 application is that the applicant Bell company becomes subject to this Commission's enforcement authority under section 271(d)(6) in the event it fails to continue complying.

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[16] *Compare* 47 U.S.C. § 271(d)(6) *with* § 271(c)(1)(A).

[17] 47 U.S.C. § 271(d)(6).

[18] 47 U.S.C. § 252; see also § 271(c)(1)(A). BellSouth backdoor effort to imply exclusive Commission jurisdiction over 271-specific interconnection agreement disputes based on the 201, 202 pricing standard adopted by the Commission equally runs afoul of the express grant of state commission jurisdiction over pricing pursuant to section 252.

BellSouth correctly points out that this Commission enjoys the authority to establish a standard for setting the rates, terms and conditions of access to items in the section 271 checklist, as the Commission itself recognized in the *Triennial Review Order*.[19] Moreover, as BellSouth correctly points out, the Commission has on a number of occasions stated that the correct standard for setting the rates, terms and conditions of access to items in the section 271 checklist is contained in sections 201 and 202 of the Act.[20] The Commission's mere development of a standard governing terms, conditions and pricing of section 271 checklist items, however, in no way conflicts with state commission implementation of that standard. Indeed, state commissions routinely apply the Commission's federal TELRIC pricing standard in much the same way for network elements unbundled under section 251(c)(3). What BellSouth's position fails to explain is how exactly the Commission's standard for the terms of access to section 271 checklist items would ever come to actually be implemented. As explained above, the plain language of the Act makes clear that the only means of implementing such access is through the interconnection agreement and SGAT processes laid out in section 252.

Moreover, there is no dispute in this instance that the TRA has failed to apply the standard annunciated by this Commission for access to section 271 checklist items, because the TRA has not yet even issued its written order explaining the basis for its decision adopting interim rates. In the absence of a decision explaining the bases for the TRA's order, there is simply no basis for this Commission to determine whether or not the TRA erred in the standard it applied to the underlying interconnection arbitration at issue. In other words, BellSouth's petition for preemption is not yet ripe. Even leaving

[19] *See* BellSouth Petition at 8. *See also Triennial Review Order* at para. 664.

[20] *See id.*

the issue of ripeness aside, however, as a general matter the appropriate means of addressing whether or not a state commission correctly applies this Commission's standards is not to preempt the state commission's determination. Rather, as the plain language of the Act makes clear, the correct avenue for a Bell company to challenge the substance of a state commission's application of the Commission's federal standards in the context of an interconnection arbitration is through review in the relevant federal district court.[21] In other words, if BellSouth believes the TRA erred in its application of the Commission's federal standards for access to section 271 checklist items, it can have its day in court to prove that. But BellSouth seeks no such substantive review here, nor does its challenge even go to the substance of the TRA's decision-making. Rather, what BellSouth's seeks is simply "preemptive" preemption – so that its challenge can avoid addressing the merits of the TRA's decision.

II. The Commission Has On Numerous Occasions Recognized the Authority of States to Enforce the Terms of Section 271 Post-Approval

The notion that a state commission's authority to enforce the terms of section 271 access somehow disappears upon a Bell company's receipt of section 271 approval from this Commission is further belied by this Commission's own previous recognition of state commission authority to enforce the terms of section 271 access post-approval. While noting that Congress authorized the FCC to enforce section 271 to ensure continued checklist compliance, the New York 271 Order specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

[21] *See* 47 U.S.C. §252(e)(6).

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[22]

Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[23] Each and every subsequent FCC order granting BOC long distance entry reached the same conclusion: state commissions are fully empowered to ensure BOC compliance with the competitive checklist after section 271 application approval.

Indeed, as recently as the Commission's very last 271 order for Arizona, the Commission commended state commissions for all the work they performed in rendering Bell company operations and processes 271 compliant:

> This Order marks the culmination of years of extraordinary work by the state commissions. We take this opportunity here, in the Commission's last section 271 application, to commend all the state commissions for their work in this area since passage of the 1996 Act. Today, we are reviewing a Bell operating company's (BOC's) performance that has been shaped and refined by the Arizona Corporation Commission (Arizona Commission). The Arizona Commission and its staff performed an exhaustive review of Qwest's compliance with its section 271 obligations spanning four years and resulting in several dozen orders. Their efforts facilitated "an almost complete transformation of Qwest's systems and processes from one that was not conducive to local competition to one that . . . will foster local competition."[24]

Moreover, the Commission's order made clear that continuing state commission authority to enforce Bell company compliance with the requirements of section 271 extended

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[22] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order)* at ¶ 452.

[23] *New York 271 Order* at n. 1353.

[24] *Application by Qwest Communications for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Arizona,* WC Docket No. 03-194, Memorandum Opinion and Order, FCC 03-309 (*Arizona 271 Order)* at ¶ 2 (citations omitted).

beyond the date of Commission 271 approval. Indeed, in determining to grant Qwest's Arizona 271 application, the Commission relied explicitly on the ongoing enforcement authority of state commissions post-approval, under either federal or state law:

> We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long distance market. These mechanisms are administered by the state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6).[25]

Futhermore, the Commission took explicit note of the specific authority of state commissions to resolve carrier-to-carrier disputes under section 271. As the Commission stated, "section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by state commissions:"

> As noted in the *SWBT Texas Order*, the Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure that the results of the state arbitration process are consistent with federal law. Although the Commission has an independent statutory obligation to ensure compliance with the checklist, section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions, particularly now that the Supreme Court has restored the Commission's pricing jurisdiction and has thereby directed the state commissions to follow FCC pricing rules in their disposition of those disputes.[26]

Indeed, in making such a statement the Commission was acknowledging the ongoing authority of the TRA post-approval to resolve intercarrier disputes over the requirements of section 271 – the very type of intercarrier dispute of which Bellsouth complains here. In light of these rather pointed, explicit findings by the Commission of continuing state

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[25] *See id.* at n. 196.

[26] *See id.* at Appendix C, para. 22 (citations omitted).

commission authority to enforce the provisions of section 271 of the Act post-approval, Bellsouth's petition to preempt such jurisdiction is unsupportable.

III. Having Voluntarily Subjected Itself to 252 Arbitration of Line Sharing Access under Section 271, BellSouth Should Not Be Allowed to Escape That Arbitration

As explained above, the plain language of the Act makes clear that state commissions retain exclusive jurisdiction over the implementation of access to section 271 checklist items, through their authority over the 252 negotiation and arbitration process. Even leaving aside this specific jurisdiction to regulate the terms of access under section 271, it is well settled law that state commissions have jurisdiction to arbitrate disputes over non-251 issues when the parties voluntarily enter into negotiations over them. Yet, notwithstanding this well-settled law, BellSouth makes particular hay out of Covad's petitions for arbitration of line sharing access under section 271 in the 7 states of the BellSouth region.[28] According to BellSouth, it is critical that the Commission grant its petition so that no state commission proceeds further in entertaining and deciding the issues presented in Covad's arbitration petitions.[29] BellSouth neglects to mention that it has subjected itself to state commission jurisdiction over such arbitrations by entering into voluntary negotiations with Covad over line sharing access under section 271. Moreover, BellSouth neglects to mention that state commission jurisdiction over exactly the kind of non-251 access presented in Covad's arbitration petitions has been recognized by the 5th Circuit U.S. Court of Appeals.

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[28] *See* BellSouth Petition at n. 1 and Ex. A.

[29] *See id.*

As the 5th Circuit has held, state commissions retain jurisdiction under section 252 to resolve non-251 issues when the parties include such issues in their negotiations. *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003). In *Coserv*, the Fifth Circuit held that "where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations."[30] In the case of Covad's arbitrations in the BellSouth region for access to line sharing under 271, the parties voluntarily included line sharing in their TRO interconnection agreement amendment negotiations.[31] In that circumstance, state commissions retain jurisdiction to resolve whatever non-251 "open issues" remain pursuant to section 252.[32]

By seeking this Commission to provide "preemptive preemption" of state commission jurisdiction over Covad's line sharing arbitration petitions, BellSouth seeks to have this Commission issue an order that flies in the face of a federal appeals court decision. Contrary to BellSouth's wishes, this Commission is not empowered to override the opinion of the Fifth Circuit – nor should it even try. BellSouth has voluntarily subjected itself to state commission jurisdiction over Covad's line sharing arbitration claims by entering into negotiations with Covad over access to line sharing under section 271. Having entered into such negotiations, BellSouth should not now be allowed to turn around and escape the consequences of those negotiations. Rather, as the *Coserv*

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[30] *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003).

[31] Direct Testimony of William H. Weber, NCUC Docket No. P-55, Sub 1522, p.3, ll. 4-6.

[32] *Coserv*, 350 F.3d 482, 487.

decision makes clear, BellSouth should be bound by the consequences of its action, and remain subject to state commission jurisdiction over Covad's line sharing arbitration petitions.

IV. Public Policy Considerations Support State Commission Jurisdiction.

The interpretation of the Act set-forth above will advance the efficient resolution of interconnection disputes, as well as encourage commercial agreements. Competitive carriers need a forum in which to seek timely resolution of disputes over interconnection, including disputes over the terms of access to items enumerated in the 271 checklist. Should this Commission undertake that task exclusively, the Commission's resources would be quickly overwhelmed. Indeed, the Commission would sow the wind of federal jurisdiction, only to reap a whirlwind of arbitration claims to adjudicate on its own.[33] If the Commission asserts exclusive jurisdiction to establish the terms of section 271 access, then in a world where carriers require both 251 and 271 elements, and thusly agreements about them, carriers will be obliged to seek interconnection agreements both at the state commissions and at this Commission – a possibility which would bring literally thousands of such requests – as well as an attendant wave of appeals.

Moreover, carriers would be obliged to seek interconnection dispute resolution in two forums – state commissions for 251 elements and the Commission for 271 elements – as well as seek appeals in differing jurisdictions. While the Commission is well-suited to guide state determinations through the issuance of federal standards (e.g., TELRIC for 251 UNEs, and 201 "just and reasonable" for non-UNE 271 checklist items), state commissions, subject to federal court oversight and guided by Commission precedent, are

[33] Hosea 8:7 ("They have sown the wind, and they shall reap the whirlwind.")

better suited to specific rate making and interconnection dispute resolution. As a consequence, it will be far more efficient for state commissions – at least in the first instance – to serve as the adjudicative body for interconnection agreement disputes, including 271-specific elements. Congress recognized this truism in drafting the Act when it placed jurisdiction over interconnection agreements, both for 251 and 271 elements, within the purview of state commissions.

In addition to facilitating dispute resolution, state commission jurisdiction will also encourage the Bell operating companies to engage in reasonable commercial agreements. For the most part, Bell operating companies remain intransigent in their commercial agreement negotiations as a direct consequence of an absence of any potentially adverse regulatory treatment. Indeed, after well over a year of trying to negotiate commercial agreements for access to line sharing, Covad has been able to reach agreement with only one of the four Bell companies – Qwest.[34] Why form commercial agreements, when simply waiting and doing nothing will eliminate the competition? Bell operating companies have no incentive to enter a commercial agreement because – absent a 271 obligation – there is little external pressure to negotiate. If the state commissions are on the verge of enforcing their section 271 obligations, however, there is significantly more incentive for the Bell operating company to negotiate in good faith. The competitive carrier is similarly motivated to obtain certainty across the region and avoid state by state inconsistent verdicts. As a consequence, state jurisdiction over 271-specific elements will serve two important public policy objectives: Efficient dispute resolution and encouraging commercial agreements.

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[34] *See* "Covad and Qwest Sign Commercial Line-sharing Agreement," Press Release, April 15, 2004 (available at http://www.covad.com/companyinfo/pressroom/pr_2004/041504_news.shtml).

V. Conclusion

For the forgoing reasons, Covad respectfully submits that the Commission should reject BellSouth's petition.

Respectfully submitted,

/s/

Charles E. Watkins
Senior Counsel
Covad Communications
1230 Peachtree Street, N.E.
19th Floor
Atlanta, Georgia 30309

Praveen Goyal
Senior Counsel for Government &
Regulatory Affairs
Covad Communications Company
600 14th Street, N.W.
Washington, D.C. 20005
202-220-0400 (voice)
202-220-0401 (fax)

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